[illegible] and control of the various branches and [illegible] of the insurance business. The instant case deals with so much of that system as relates to the business of fire insurance.

The general system had its inception in 1895, in which year, in the general statutes of the state, it was codified and revised. Incidentally, it was provided by those laws that no contract (policy) of fire insurance should be written by any insurance company in that state, covering property therein, except under what was termed the "Standard Form" of policy, the terms of which were prescribed by the statute and the use whereof, in all cases, as held by the court of last resort of that state, made compulsory.

General Laws of Minnesota, 1895, Ch. 175.

The requirements of the law extended to both domestic and foreign insurance companies and, as will be presently shown, the original and amendatory law imposed various penalties, criminal and otherwise, for the violation of any of their provisions by either insurance companies or their agents.

The standard form of policy thus prescribed was, in many respects, similar to those adopted in various of the other states. Such differences as existed in the originally prescribed form are not material to the present issues.

Amongst others of these provisions prescribed by the statute and required to be incorporated in all insurance policies written and covering property in the state, was one relating to the subject of ascertaining the amount of loss and damage by arbitration. In the original form, this provision followed in substance the terms customarily employed in the older forms of policies antedating the legislative systems, as well as the similar provisions provided by the laws of the various

precedent to any action on the policy.

Thus, by Section 65, Ch. 175, of the General Laws of 1895, as corrected by Ch. 254 of the General Laws of 1897, the statute, after providing for arbitration respecting the amount of loss and damage, continued as follows:

> "And such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

As far as here material, the provisions of the General Laws of 1895 were carried verbatim into the Revised Statutes of Minnesota for 1905 and thereafter continued effective until 1913. By the General Laws of the year last stated a change was made in the standard form of policy with respect to the subject of arbitration of the amount of loss and damage. For the previous provision, there was substituted one making arbitration in all cases, unless waived by both parties, compulsory.

General Laws of Minnesota, 1913, Ch. 421.
Mason's Minnesota Statutes, 1927, Sec. 3512.

This provision, as construed by the Supreme Court of that state (a subject to be considered in more detail in the later argument) required insurers, in all cases, to submit to arbitration on the demand of the assured and prescribed a system whereunder, in the event the insurer declined to arbitrate, a board of arbitrators could be completed by application to some judge of a local court for the appointment of an umpire to act with the arbitrator designated by the assured.

penalties otherwise prescribed.

Id.

Appellant was a corporation organized under the laws of Wisconsin and at the time in controversy, licensed to [illegible] on the business of fire insurance in Minnesota (R. 31).

On or about April 3, 1924, appellant issued to [illegible] Hardware Company, a Minnesota corporation engaged in the general mercantile business in the city of [illegible], a policy of fire insurance in the standard form prescribed and dedicated, thereby insuring a miscellaneous assortment of merchandise and other property of the assured against loss or damage by fire, in the sum of $9,000.00 (R. 8).

Additional concurrent policies, insuring the same subject matter, were issued by other insurance companies bringing the aggregate total of outstanding insurance at the time of the loss to the amount of approximately $30,000.00 (R. 4).

All the insurance thus indicated was outstanding and in force on March 9th, 1929, on which date a fire occurred resulting in loss and damage to the insured property (R. 10).

Following the date of the loss, demand was made in the usual form by the assured for arbitration of the amount of loss and damage (R. 32-33). The insurers declined to participate in such arbitration and thereupon application, in accordance with the provisions of the statute, was made to a judge of one of the local courts for the appointment

as umpire to act with the arbitrator designated by the assured in determining the amount of loss (R. 33-37).

The appointment last indicated having been made, the board of arbitrators thus comprised, after notice to the insurers, proceeded to determine the amount of the loss. The insurers neither appeared nor in anywise participated in the proceeding. On April 20th, 1929, an award was returned by such arbitrators finding and determining the sound value of the insured property immediately preceding the fire in a sum slightly exceeding $81,000.00 and that the resulting loss and damage thereto occasioned by the fire was $74,904.91 (R. 42-43).

Following the rendition of the award, notice thereof was given to the insurers and demand made for payment thereof. The insurers having refused to recognize such demand, action was instituted on the award by appellees as the assignees of the assured's claim (R. 15).

In accordance with the permissible local practice, all of the insurers were made parties defendant. The complaint alleged in detail the several matters thus referred to, including the rendition of the award and refusal to pay the amount thereof and prayed judgment against the insurers for their respective proportionate amounts (R. 12-15).

The insurers, by their several answers, specifically challenged the validity of the award on the grounds that the statute under which the same was rendered contravened the provisions of both the state and federal constitutions. As respects the latter, the statute was alleged as violative of the provisions of the Fourteenth Amendment; in that it constituted a denial of (1) due process of law; (2) the equal protection of the law, and (3) the ordinary liberty of contract.

Preliminary to the trial in the court of original jurisdiction, an order was made providing that all of the issues

excepting that of the proportionate [illegible] dants should be submitted as a fact. (R. 56)

On the trial of the cause, plaintiffs introduced in evidence the formal matters, including the issuance of the several policies; the date of the loss; the [illegible] tration; the proceedings for the appointment of an appraiser, the composition of the board comprising the [illegible] inally designated by the assured and the [illegible] by the court, and the rendition of the award (R. 56-57).

No evidence was offered or received on behalf of the plaintiffs (other than the award) either with respect to the actual value of the subject-matter of the insurance immediately preceding the fire or of the amount of the loss and damage sustained thereto as a result of the fire.

At the conclusion of the plaintiffs' evidence, the defendants rested. They thereupon severally moved the court for a directed verdict, assigning as the grounds of such motion the invalidity of the award by reason of the unconstitutionality of the statute pursuant to which it was rendered. The constitutional grounds with respect to the Federal Constitution urged in support of the motion were those hereinabove indicated (R. 57).

These motions were severally denied, the insurers reserving exceptions to the ruling in each instance (R. 57).

Under direction of the court, a verdict was returned in plaintiffs' favor in the sum of $77,001.46 (R. 57-58), which was supplemented by Findings of Fact and Conclusions of Law made by the court, in which the amount of the verdict was apportioned to the several insurers (R. 59-75).

Following the denial of a motion, under the local practice, for judgment notwithstanding the verdict (R. 75-76), judgments were severally entered against the defendants (R. 77-

ing the Fourteenth Amendment of the Constitution of the United States.

Third: The Supreme Court of the State of Minnesota erred in its decision and judgment herein, in failing to hold that the above quoted statute, as applied to this appellant, infringed the requirements of the Fourteenth Amendment of the Constitution of the United States in the following particulars, viz.:

(a) That it denied to appellant due process of law.

(b) That it denied to appellant the equal protection of the law.

(c) That it denied to appellant the liberty of contract.

Fourth: The Supreme Court of the State of Minnesota erred in its decision and judgment herein, in failing to hold that the above quoted statute violated the provisions of the Fourteenth Amendment of the Constitution of the United States in that it required of appellant, as a condition of the right to carry on and conduct its business in said state, the surrender of rights guaranteed by the Federal Constitution.

Fifth: The Supreme Court of Minnesota erred in holding that an award rendered under the aforesaid statute in proceedings in which petitioner in no wise participated was binding or valid or binding on petitioner.

Sixth: The Supreme Court of Minnesota erred in rendering final judgment of affirmance against petitioner.

ARGUMENT.

I.

General Features.

The several Assignments of Error in this [illegible] involve a single constitutional question, viz., the [illegible] the state to prescribe, as a condition to the carrying [illegible] the business of fire insurance within its limits, a system of *compulsory arbitration* respecting the obligations [illegible] out of the conduct of that business.

The effect of the prescribed system embodying the [illegible] ment thus indicated and imposing the mass of [illegible] ance companies as a condition to the right of doing [illegible] in that state cannot be obscured by generalization. The result, as applied in the instant case, is, that [illegible] single class of business and the contracts necessarily incident thereto, the legislature has assumed to [illegible] of the parties and to have prescribed in advance [illegible] corporations engaged in carrying on this particular [illegible] might waive the ordinary rights of parties in general [illegible] mit their controversies to judicial determination [illegible] as a substitute for the latter, the arbitrament and [illegible] tion of an extra-judicial body.

The results in this regard proceed from a complicated [illegible] tem of legislation which has assumed to prescribe [illegible] inate practically all of the varying features of [illegible] the business of fire insurance in that state. [illegible] system, as already indicated, the form of policy [illegible] prescribed and its employment made compulsory, as a [illegible] tion of the right of license to do business in the state.

As indicated in the appended statement, the [illegible] of the prescribed conditions is not only made a [illegible]

continuance of the insurer's license in the state but violation of the prescribed conditions is visited with criminal penalties. Extracts from the various statutory provisions are appended which will prove sufficient for the review of the questions with which we are here concerned."

The interpretation of these statutes and the resulting system thereunder devised has been indicated in a series of decisions of the Supreme Court of the state, of which the following are sufficiently illustrative.

In *Wild Rice Lumber Co. vs. Royal Insurance Co.*, 99 Minn. 156, 158, it was stated:

"A glance at the history of the standard form of policy makes it very clear that the legislature of this state intended to deprive fire insurance companies of the right to add to or change the terms and conditions of the prescribed form. The right to make such changes and additions is one of the principal distinguishing characteristics of the two classes of standard forms. * * * But the legislature of 1897, amending Section 53, C. 175, Laws 1895, in express terms prohibited the making of any changes except such as were specifically enumerated in the statute. The conclusion is inevitable that the legislature intended to deprive the parties of

[illegible]

[illegible]

[illegible]

"the right to make insurance contracts in any form as prescribed by the statute. * * * [T]he standard form, with the changes thus authorized, is the only form of fire insurance contract authorized by the laws of this state." (Italics ours.)

In *Hess vs. American Alliance Insurance Co.*, 147 Minn. 288, 290, it was said:

"In prescribing the form of standard policy, the legislature sought to secure uniformity in all contracts of fire insurance. * * * [I]t was a compulsory * * * such changes as are authorized by statute, it is the only form of fire insurance contract which may lawfully be used in this state. * * * [I]ts provisions not only constitute the contract between the insurer and the insured, but the law governing the rights of the parties as such." (Italics ours.)

As respects the particular feature of arbitration with which we are here concerned, the subject was fully considered in *Hippocrates vs. Continental Insurance Company*, 178 Minn. 215, wherein, after setting forth the statutory provision, the following was stated:

"This statute is the last expression of the legislature

"Every company and every agent who shall wilfully make, issue or deliver a policy in violation of Section 1517 shall be guilty of a misdemeanor, and every execution of such policy in force at the time shall participate in liability upon the company issuing the same." (Sec. 1518.)

"In case of the failure of any company to comply with any of the provisions of this act, its right to transact business in this state shall cease, and it shall be the duty of the commissioner of insurance to immediately institute the proper proceedings in case of such refusing such company shall not be entitled to transact business in this state for a period of one year from date of such revocation." (Sec. 1519.)

"Any insurance company of another state, * * * complying with all laws governing such corporations in general * * * shall be entitled to do business in this state." (Sec. 1711.)

will and covers the whole subject of appraisal. It must therefore be taken as an implied repeal of G. S. 1923, Section 3519, * * *

Plainly the statute expresses no intention to deny the insured the right to an appraisal, even when the insurer denies liability. In fact the right of each party to demand one is recognized explicitly. Neither can it be said that the statute does not contemplate an appraisal even though one of the parties fails to select an appraiser. The adoption of that conclusion would ignore this clear language:

> 'In case either party fails to select an appraiser within such time, the other appraiser and the umpire selected, as herein provided, may act as a board of appraisers, and whatever award they shall find shall be as binding as though the two appraisers had been chosen.'

* * * The provision last quoted must be taken in connection with the rest of the paragraph. It means that in case either party fails to select an appraiser the other may have an umpire appointed in the manner provided in case two appraisers fail to agree upon one.

"In case of the failure of any such insurance company to comply with any of the provisions of this act, * * * its right to transact the insurance business in this state shall cease, and it shall be the duty of the insurance commissioner to immediately declare its license revoked; and in case of such revocation, said company shall not be again licensed to transact business in this state for the period of one year from date of such revocation." (Sec. 1713.)

"Every company, and every officer and agent of any company, making, issuing, delivering or tendering any policy of insurance of any kind or directing any of the same to be done, in wilful violation of any of the provisions of law, for a first offense, shall be guilty of a misdemeanor, and for each subsequent offense, of a gross misdemeanor; and, in addition to all other penalties prescribed by law, every company issuing any such policy shall be disqualified from doing any insurance business in this state until the payment of all fines imposed and for one year thereafter." (Sec. 1761.)

The statute has been so interpreted since the decision in *O'Rourke vs. German Ins. Co. of [illegible]*, Minnesota, [illegible] 104 N. W. 900, as to make inapplicable the [illegible] there made that the statute has no application to a case where a referee nominated by one of the parties refuses to act as such; for the court is only authorized to appoint a third referee.' Since that time and by L. 1913, p. 61[illegible] c. 421, there has been put into the statute the [illegible] for the selection of an umpire and an award even [illegible] one party does not nominate an appraiser.

* * * The first consideration is that the obligation to arbitrate arises *from explicit law*, as well as contract." (Italics ours.)

The compulsory character of the prescribed arbitration was reasserted in *Itasca Paper Company vs. Niagara Insurance Co.*, 175 Minn. 73, later herein referred to as well as in the instant case where the result of such an arbitration was confirmed and made the basis of the judgment appealed from.

The functions of arbitrators in such cases were thus indicated in *American Central Insurance Co. v. District Court*, 125 Minn. 374, 378:

"In the case at bar the appraisers must determine

"Every officer and agent of any insurance company, required by any provision of this chapter to make any report or perform any act, who shall neglect or refuse to comply with such requirement, and every agent, solicitor or collector of such corporation in this state who fails or neglects to procure from the commissioner a certificate of authority to do such business, or who fails or refuses to comply with, or violates, any provision of the insurance law, shall be guilty, for the first offense, of a misdemeanor, and for each subsequent offense of a gross misdemeanor." (Sec. 3763.)

"Whoever violates any provision of the insurance law, where the nature of the offense is not specifically designated herein, shall be guilty, for the first offense, of a misdemeanor, and for each subsequent offense of a gross misdemeanor." (Sec. 3764.)

[illegible] which [illegible] the mere value of specific [illegible] produced before them [illegible] examination had ap[illegible] [illegible] They must determine the quantity of property covered by the policy and on hand at the time of the fire, the quantity destroyed, the quantity damaged, whether the damage resulted from causes covered by the policy or from other causes not covered, thereby, and various other questions, both of law and fact, upon which the parties may differ."

The proceeding itself has been uniformly held as having the attributes of an ordinary common law appraisal. Thus it was stated in *Christianson* vs. *Insurance Company*, 84 [illegible]:

"The board of referees provided for under the standard policy is a quasi-court, subject to the principles governing common law arbitration."

In *American Central Ins. Co.* vs. *District Court*, 125 Minn. [illegible], it was said:

"The appraisements made thereunder have generally been considered as of the nature of common-law arbitrations, and as governed by the rules applying to such proceedings, except as otherwise expressly provided. This state has always adopted that view of the law."

To the same effect:

Prudence Refrigerating Co. vs. *Insurance Co.*, 91 Minn. [illegible];

Northern Market Home Co. vs. *Insurance Co.*, 147 Minn. [illegible].

It necessarily follows from the principles thus indicated that appraisals in such cases are possessed of similar attributes to those considered in common law arbitrations in general.

awards may be impeached upon familiar grounds, [illegible]
ceipts for fraud or misconduct of the arbitrators, [illegible]
wise, they are final and conclusive, as already stated.

Christianson vs. Insurance Co., *supra*.

Produce Refrigerating Co. vs. Insurance Co., *supra*.

From the practical standpoint, the [illegible] system thus indicated is apparent. Every insurance company doing business in the state is compelled to issue the prescribed form of policy contract. In the event of a loss within the terms of that contract the insured may be, and in the instant case, was, denied right of access to the courts for the determination of the amount of its liability. In other words, it excluded from the determination by the courts of the subject, which experience has shown in the great majority of instances, constitutes the only controverted question as respects its obligation.

II.

THE STATUTORY QUESTION NOT WITHIN THE POLICE POWER OF THE STATE.

The question with which we are here concerned was presented to the Supreme Court of Minnesota in *Hanna Piano Co. vs. Niagara Fire Ins. Co.*, *supra*. That case resulted in a reversal on grounds other than those involving the constitutional question. It was held, however, that the compulsory system of arbitration was not violative of the provisions of the Fourteenth Amendment, in respect either to (a) due process, (b) equal protection, or (c) liberty of contract.

In the opinion in that case the court stated as follows:

"Insurance is a business affected with public interest and by reason thereof must yield to governmental regulation. (Citing cases)

The contention that such compulsory arbitration is unconstitutional in contravention of the Fourteenth Amendment to the fundamental law and of Art. 1, Section 7, of the state constitution, is unsound. These constitutional provisions must yield to the police power, which is paramount."

Postulated of such reasoning, it is apparent that any conditions which the legislature of a state sees fit to impose on those engaged in the business of insurance are to be held constitutional and valid, regardless of their effect in operation and similarly regardless of whether such regulations have any reference to subjects ordinarily considered within the domain of the power of police.

It would necessarily follow that it was within the province of the legislature to devise any system or method it saw fit with respect to the subject of determining the liability of insurers in general. Furthermore, if the asserted power of police is without limitation in cases where the business at which it is ostensibly directed is of a public character, no constitutional safeguards would remain.

It is unnecessary to indulge in illustrations of the possible extent to which arbitrary legislative discretion might be extended upon any such broad and sweeping theory as that suggested by the court. Neither extended argument nor citation of authorities is required to refute any such doctrine.

Broadly stated, the rule is settled that to fall within the scope of police regulation, the statutory exercise of that power must address itself to the accomplishment of some-

thing concerning public welfare.

Thus it was stated in *Coppage v. Kansas*, [illegible] as follows:

"Now, it seems to us clear that a statutory [illegible] which is not a legitimate police regulation [illegible] made such by being placed in the same act with a [illegible] regulation, or by being enacted under a title [illegible] declares a purpose which would be a proper object for the exercise of that power. 'Its true character can not be changed by its collocation,' as Mr. Justice Grier said in the *Passenger Cases*, 7 How. 283, 458" (pp. 15-16).

And again:

"But, in our opinion, the Fourteenth Amendment debars the state from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights can not of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment" (pp. 18-19).

And again:

"But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court can not, in the proper performance of its duty, yield its judgment to that of the state court" (p. 15).

differed from those in the cases last [illegible] that if arbitration of the claim were refused the claimant should be entitled to recover [illegible] fees in the event of suit. The statute was held unconstitutional.

Various expedients have been resorted to [illegible] tures of different states to avoid delays in the settlement claims against common carriers by the imposition of penalties. These cases are quite fully reviewed in *Chicago Ry. co. Nye, etc., Co.*, 260 U. S. 35, in which the limitations of the legislative authority are expounded.

It is unnecessary to consider the broader phases of legislation ostensibly directed at the compulsory arbitration of controversies. That no such power exists, is settled by

Wolff Co. vs. Industrial Court, 262 U. S. 522;

Dorchy vs. Kansas, 264 U. S. 286.

It is, of course, admitted that the business of insurance is affected with a public interest and therefore subject to state regulation in the exercise of the latter's legitimate power of police.

Northwestern, etc., Ins. Co. vs. Minn., 232 U. S. 516;

German Alliance Ins. Co. vs. Kansas, 233 U. S. 389;

National Ins. Co. vs. Woolsey, 256 U. S. 35.

The authorities are quite fully reviewed in the cases cited. In each instance where the exercise of the power has been sustained, with the exception of certain of the earlier authorities in which it was erroneously predicated upon unlimited control over foreign corporations, it has been directed at the correction of abuses and the prevention of the public welfare.

The statute with which we are here concerned cannot be assigned to the class thus indicated. There is a broad distinction between prescribing the form or terms of a contract and prescribing the methods by which the obligation of such contract may be enforced. A similar distinction may be made between the class of cases in which limitations on the effect of applications for insurance have been sustained and the right of interposing certain defenses, denied.

It will not do to ascribe a system of compulsory arbitration, committed to the jurisdiction of an extra-judicial tribunal, to the domain of remedial law. The latter obviously has reference to instances of judicial procedure. The system with which we are here concerned, on the contrary, is wholly foreign to anything pertaining to judicial procedure. No principle has been suggested and none occurs that justifies assigning denial of right of recourse to the courts, respecting an ordinary contractual obligation, to the field or domain of police power. The segregation of a single class of business of ordinary commercial character from all other classes with the imposition on the former of conditions depriving the right of judicial redress accorded the latter, presents a discrimination which contravenes both the due process and equal protection provisions of the fundamental law.

This branch of the discussion cannot be better concluded than by quoting the language of this court in *Gulf Colorado, etc. Ry. vs. Ellis*, 165 U. S. 150, as follows:

"It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or

equally with other debtors [illegible] courts as other litigants under like circumstances with like protection" (p. 153).

Again:

"While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of absolutely holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation, is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restricting state action" (p. 154).

Again:

"But a mere statute to compel the payment of debts does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation" (p. 158).

III.

As Applied to Appellant, the Exaction of Compliance With the Statutory Condition Was Tantamount to the Requirement of the Surrender of a Constitutional Right as the Condition of the Privilege of Doing Business Within the State.

The principle alluded to in the caption is so clearly established as to require nothing more than a brief reference

protection of people and corporations living under our institutions" (pp. 286, 287).

The principle was restated in *Frost vs. Railroad Commission*, 271 U. S. 583, as follows:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. * * * If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel the surrender of all. It is inconceivable that guaranties inbedded in the Constitution of the United States may thus be manipulated out of existence" (pp. 593, 594).

In *Hanover Ins. Co. vs. Harding*, 272 U. S. 494, the effect of these decisions was sought to be qualified by the claim that where a corporation had voluntarily accepted and acted upon the provisions of the local law, its rights and obligations could be predicated of the voluntary contractual relation resulting. This contention was answered in the following statement:

> "One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits, *is contractual*, and that, *by coming into the State and engaging in business on the conditions imposed*, it waives all constitutional restrictions, and cannot object to a condition or law regulating its obligations, even though, as a statute operating *in invitum*, it may be in conflict

with constitutional limitations. [illegible] prevail in view of the decisions of this Court in [illegible] considered cases." (Italics ours.) (p. 612.)

The rule was restated in *United States ex. rel. [illegible] St. P. Ry.*, Adv. Op. 142 (51 Supr. Ct. Rep. 109), as follows:

"Broadly stated, the rule is that the right to [illegible] the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to [illegible] condition prescribed by the state which is void under the provisions of the Federal Constitution."

In considering the effect of the law with which we are dealing in the instant case, the salient fact, both from the jurisdictional and constitutional standpoints, is its effect or operation as applied to appellant.

Dahnke-Walker Co. vs. Bondurant, 257 U. S. 282.

As held in *Coppage vs. Kansas, supra*, in the excerpt already quoted, the decision does not depend upon the form of the law or its declared purpose. The test is found in its operation and effect as applied and enforced by the state, and with respect to these matters the judgment of the state court is not controlling.

The circumstance that the law in question is part of a regulatory system and may be superficially characterized as incidental is not determinative, for, as similarly stated in *Coppage vs. Kansas, supra*, in substance, if it is not a legitimate police regulation, it cannot be made such by the incorporation in the terms of an act which, in other respects, may be assigned to a proper exercise of the police power.

In so far as the law requires the insurer to submit the determination of the amount of its obligation or liability

prohibition without right of recourse to the courts, the subject must be approached and considered from the standpoint that this is something wholly collateral and independent of anything properly pertaining to the regulation of the business of insurance. The laws of the state, as far as we are presently concerned, make no exception in their requirements. These last must be accepted *in toto*, or, as the alternative, a corporation must refrain from carrying on business in the state.

The acceptance of the provisions from a practical standpoint may be regarded as involving a species of "duress."

In *Union Pacific Ry. Co. vs. Public Service Commission*, 248 U. S. 67, it was contended that the acceptance by a corporation of certain provisions of the law was tantamount to a waiver of constitutional rights and that any federal question was thereby excluded.

In reply to this contention, this court stated as follows:

> "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fe Ry. Co. vs. O'Connor*, 223 U. S. 280" (p. 70).

The terse and pointed statements of Mr. Justice Lamar in *German Alliance Ins. Co. vs. Kansas, supra*, and of Mr. Justice Holmes in *Block vs. Hirsch*, 256 U. S. 135, 157, to similar effect, were quoted in our "Statement of Jurisdiction" and need not be repeated.

As far as the local law is concerned in its resultant operation and effect, a quite anomalous situation is presented in view of the decision rendered by the Supreme Court of the

state in *St. Paul, etc., Ry. vs. Gardner*, 19 Minn. 132.

In that case, upon extended consideration of constitutional principles, it was held that the legislature was without authority to provide for a compulsory reference in common law actions by order of the court.

It is difficult to conceive the legal distinction between a statute assuming to confer such a power on the courts of the state and one which in substance confers a similar right on one of the parties to a controversy without the intervention of the court. Such however, is the natural and necessary effect of the statute with which we are here concerned, and, as already indicated, that statute cannot be sustained without denying, as respects the business of insurance, the ordinary rights which are recognized and inherent in all other lines of business in general, of recourse to the courts for the determination and settlement of all controverted obligations.

IV.

The Theory of Voluntary Contract Untenable.

The Supreme Court of Minnesota said in the Itasca Paper Company case, *supra*, as follows:

> "However the policy with the provision for the board of appraisal is a contract voluntarily made by the parties, notwithstanding the form is prescribed by the statute." 175 Minn. 71, 76.

This statement was made on the authority of a previous decision of the same court and precedents from other state decisions cited.

It will be noted, however, that the decision in the instant case, while citing that in the Itasca Paper Company, *makes no allusion to the theory of voluntary contract.* It is fairly

invisible the court saw that consistently with principle, the theory of voluntary contract could not be sustained—in other words, that lacking the statutory sanction and considered solely from the standpoint of contract, the scheme of compulsory arbitration would be ineffective.

For the immediate moment, the reasons for this apparent change of viewpoint may be postponed. It will suffice to quote the following language of the court:

> "The companies claim that an agreement for a common law arbitration is revocable, and therefore the policy provision is revocable, and they claim that by refusing to participate they revoked. This does not follow. *It was never the intent of the statute that the arbitration was other than compulsory*" (Rec., p. 89, Italics ours).

It is, of course, apparent that the conclusion of the state court with respect to the effect of a policy issued in form and terms made compulsory by its laws is not controlling on this court in the determination of the constitutional question. This is perhaps sufficiently indicated in the cases already reviewed.

It was plainly stated in the syllabus of *Ward vs. Love County*, 253 U. S. 17, as follows:

> "The jurisdiction of this court to review a judgment of a state court the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable."

The opinion, which expounded the principle in more detail, added the following terse comment:

> "Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided" (p. 22).

It was stated *arguendo* in *Insurance Co. vs. Morse*, 20 Wall. 445, 450-451, that an agreement made with the state to the effect that property rights "should in all cases be submitted to arbitration," was void and unenforceable.

Similarly, in *Southern Pacific Co. vs. Denton*, *supra*, that a statute requiring a corporation, as a condition precedent to doing business within the state, to surrender constitutional rights—

> "Was unconstitutional and void and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

It is difficult to perceive any logical ground for postulating a distinction between such agreements when made with the state and when made with citizens of the state under compulsion of the latter's requirements.

In this connection it may be observed that in its resultant effects, the circumstances that the statutory provision for arbitration was incorporated in the policy is of no moment. Under all laws of this class, the provision of the statutes are generally held interpolated on the policy contracts, whether set forth therein, or otherwise, and that provisions in the contract itself contravening the statutes are ineffective.

This rule was applied by the Supreme Court of Minnesota in *Heim vs. American Alliance Ins. Co.*, *supra*.

That it generally obtains will sufficiently appear from the following:

Whitefield vs. Aetna Ins. Co., 205 U. S. 489.
Equitable, etc., Society vs. Clemens, 140 U. S. 226.
Hancock, etc., Ins. Co. vs. Warren, 181 U. S. 73.
Hicks vs. British American, etc., Co., 162 N. Y. 284.

Bourgeois vs. Northwestern, etc., Ins. Co., 86 Wis. 606.
Gardner vs. Insurance Co., 163 N. C. 367.
Noem vs. Equitable, etc., Ins. Co., 35 So. Dak. 593.

The reason for the apparent abandonment in the instant case of the untenable theory of voluntary contract is made reasonably clear, if regard be had to the necessary consequences of that theory. Approaching the question from the standpoint of *the contract alone*, as must be done if the idea of the statutory sanction is to be excluded, the criterion must obviously have been found in the established rules of the common law.

The Minnesota court, as already shown, had uniformly held that the arbitration contemplated was, to all substantial intents and purposes, governed by common law rules. It necessarily followed that the incidental rights and obligations were to be tested on common law principles.

While some confusion manifests itself in the decisions of the different jurisdictions, the great weight of authority sustains the principle that executory agreements for arbitration fall broadly into two classes: In the first of these, the agreement contemplated the submission of the entire controversy to arbitration and was held ineffective on grounds of public policy as ousting the jurisdiction of the courts.

In the second, the agreement was limited to the determination of incidental elements not covering the entire subject-matter, thus not ousting the jurisdiction of the courts, and was accordingly held valid.

The great landmarks in insurance law expounding the distinction thus indicated are *Scott vs. Avery*, 5 H. L. Cas. 811, and *Hamilton vs. Insurance Co.*, decided by this court, 136 U. S. 242.

As applied to the first class it was generally said the

"agreement" for arbitration was revocable. In [illegible] class, that it was not. All that was meant by [illegible] in the succinct statement of Mr. Justice Brandeis in the *Cross Line vs. Atlantic Fruit Co.*, 264 U. S. 109, was that in the first class the agreement was invalid, while in the second it was valid.

Notwithstanding, it was settled at common law, as shown by the cases cited in the opinion last above, that a valid agreement for arbitration was not specifically enforceable and that the consequences of its breach or non-performance were limited to an action for damages.

As a result of the principles thus indicated, the English and American authorities uniformly held a submission to arbitration could be revoked at any time before award rendered.

The cases are collated in the note to *Williams vs. Branning Mfg. Co.*, 47 L. R. A. (N. S.) 337, 400, note XVIII.

The decisions in Minnesota recognize this rule:

Holdridge vs. Stowell, 39 Minn. 360.

Minneapolis, etc., Ry. vs. Cooper, 59 Minn. 290.

The authorities generally have applied the same rule in cases of arbitration under the common form of insurance policy contracts.

See *Harrison vs. Hartford Fire Ins. Co.*, 112 Ia. 77.

Nurney vs. Firemen's Fund Ins. Co., 63 Mich. 633.

Chippewa Lbr. Co. vs. Phenix Ins. Co., 80 Mich. 116.

Home Fire Ins. Co. vs. Kennedy, 47 Nebr. 138.

Franklin vs. New Hampshire Ins. Co., 70 N. H. 251.

People vs. Nash, 111 N. Y. 310.

Mentz vs. Armenia Fire Ins. Co., 79 Pa. 478.

Pepin vs. Societe, etc., 23 R. I. 81.

In the application of these principles, the only sanction [illegible] to the arbitration feature in insurance contracts was that making compliance, when properly demanded, a condition precedent to any action to recover the loss. Under the common law therefore, there was no way in which either party to an insurance contract could force the other into an arbitration against his will. Furthermore, a submission though made, was revocable by either party before the rendition of an award thereunder. The consequences were that in case the submission were revoked by the assured, the insurer could plead non-observance of the policy's requirement in abatement, in all cases where the terms of the policy either expressly or by necessary implication made an award a condition precedent to action brought.

See *Monnett vs. German American Ins. Co.*, 50 Minn. 341.

Revocation, on the other hand, on the part of the insurer, was tantamount to a waiver of the condition precedent and, in the almost innumerable cases in which such waiver was held to have existed, immediate action on the policy was permitted.

The relatively brief review of these features sufficiently shows the confusion of ideas indicated by the Supreme Court of Minnesota in its decision in the instant case.

The following statement in the opinion is illustrative:

"The claim is there made that the arbitration provision, if compulsory, ousts the jurisdiction of the court and therefore is invalid" (R. 88).

[illegible] is assigned to vivid imagination as no such [illegible] was ever made or dreamed of by counsel for appellant. What was contended for and sought to be enforced

[illegible] that the court [illegible]

If it excluded the compulsory effect of the statute [illegible] stand on the principles of the common law [illegible] the latter was assumed, the scheme of arbitration [illegible] effectual by reason of the fact that under [illegible] mon law principles it was not susceptible of [illegible] formance and was open to revocation at any time [illegible] award was rendered. That the latter conception [illegible] destructive of the statutory purpose is self-evident [illegible] plains, as already indicated, the apparent change [illegible] point of the court.

The concession in the opinion with respect to the [illegible] *pulsory purpose of the statutory requirement* excludes [illegible] course to the theory of voluntary contract.

Without this, whether considered from a practical or [illegible] standpoint, it is difficult to find so much as a plausible [illegible] gument to sustain the contention that a form of [illegible] made compulsory by law and with reference to the terms [illegible] which the law admits of no variation, is voluntary. The only option reserved is that of accepting the law's require[illegible] ments or going out of business. In the constitutional [illegible] there is nothing voluntary in these alternatives.

The situation, in principle, would not have been [illegible] ly dissimilar had the statute required the standard policy to include an agreement that the insurer would not remove any case or controversy arising thereunder into the Federal Courts.

We are unable to perceive any logical ground [illegible] which it may be claimed that the circumstance [illegible] waiver of constitutional rights is required to be [illegible] each policy issued, changes the situation from what [illegible] have been had the requirement been limited to a single [illegible]

action with the State which would necessarily have been incorporated on the policy by implication.

The result is a change of form but not of substance. The multiplication of the number of stipulations affecting the waiver can have no effect on the latter's validity.

V.

Miscellaneous in Conclusion.

The result of the statute and standard form of policy thereby prescribed, required that appellant and all other foreign insurance companies should waive the ordinary right of recourse to the courts with respect to the determination of the amount of their respective obligations and accept in lieu of such redress, the award of a non-judicial tribunal.

The resulting situation would have been wholly changed had the system devised provided for appeal or review by the courts of the decisions of the specially constituted tribunal thus created. The latter however, was not the fact.

McQuaid Market House vs. Insurance Co., supra.

Kaufman vs. Jewelry Co., 168 Minn. 431.

The various attempts of legislatures to create and accord finality to the decisions of specially constituted boards or bodies without the right of review or appeal to the courts has uniformly been held to contravene the Fourteenth Amendment as a denial of due process as well as the equal protection of the laws.

See *Ohio Valley Co. vs. Ben Avon Borough*, 253 U. S. 287, and cases cited.

The Supreme Court of Minnesota in the opinion under review as well as that in the Ithaca case emphasize the fact

that the award did not determine the [illegible]
As far as the questions with which we are here [illegible] concerned, this is little more than a play on words. [illegible] liability is, of course, determined, and determined [illegible] as far as the all important issue of amount of loss and [illegible] age is concerned. There may be other defenses available, such as the violation of conditions precedent or subsequent, but reconsideration of the single issue, which, in the great majority of cases, presents the only subject-matter of controversy, is precluded.

It is unnecessary to consider the resultant effect had appellant acceded to the demand for arbitration and participated in the proceedings thereof. In the instant case, appellant and the other insurers concerned neither appeared nor took any part in such proceeding; on the contrary, from the beginning have stood strictly on their legal rights, challenging the law prescribing the compulsory system.

We similarly have no concern with the question which would have arisen had the respondents established the amount of loss and damage, claimed to have been sustained, by competent proofs introduced at the trial independent of the award. Had this procedure been adopted, appellant would have had its day in court and the results have been held tantamount to an abandonment of the award and establishment of the obligation under the policies in the ordinary manner.

It has been heretofore contended that the legal system prescribed by the Minnesota Statutes is indiscriminately applicable to foreign and domestic insurance companies alike.

The answer to any such contention is found in the [illegible] statement of Chief Justice White in *Harrison vs. St. Louis, etc., Ry. Co.*, 232 U. S. 318, 332, as follows:

At once it is to be observed that the contention proceeds upon a self-evident misconception which is this, that if only wrong be indiscriminately done, it becomes rightful."

The circumstance that the prescribed system provides for the application to a court for the appointment of an umpire is of no moment. It is perfectly plain that the function exercised by the court in this regard is non-judicial. It rests upon nothing more tangible than the assumption the tribunal thus called upon will exercise impartiality in the appointment indicated.

From the standpoint of the principles with which we are here concerned, it is seemingly apparent that if the power to prescribe any such system resided in the legislature, the method of its exercise could not be called in question. The statute would have had precisely the same force and effect had the appointment been left to a justice of the peace or any other designated public functionary.

In the Itasca case, the Supreme Court of Minnesota indicated that the constitutional question was not available as a defense to an action brought on the award, adding that the situation did not present the alternative of accepting the law or going out of business as no one was bound to observe the requirements of an unconstitutional law.

Ludwig vs. Western Union Telegraph Co., 216 U. S. 146, was cited in support of the theory thus announced.

It should require no argument to demonstrate that if the law itself were unconstitutional, nothing done thereunder could be accorded legal validity or effect. On the assumption indicated, the arbitration would be a purely ex parte proceeding devoid of legal sanction on which no rights could be predicated in a judicial proceeding.

If it further be assumed that [illegible] cated in the Ludwig case was [illegible] follows that such remedy was exclusive [illegible] have recourse thereto was tantamount to a [illegible] tutional rights.

A complete answer to this contention is found in [illegible] *vs. Chicago, etc., Ry.*, 241 U. S. 533, 539.

It should require no argument to demonstrate that [illegible] particular scheme devised by the Minnesota law was [illegible] the constitutional power of the legislature of that [illegible] variety of different schemes affecting different lines of [illegible] dustry and endeavor and having the same ultimate [illegible] must be recognized as legal. Upon this theory, the [illegible] guards incorporated in the Fourteenth Amendment [illegible] be left to the mercy of arbitrary legislative discretion [illegible] become conspicuous for their non-observance rather than [illegible] their recognition.

It is therefore submitted that the judgment here appealed from was erroneous; that the statute of the state to which that judgment was referable and without which it could not have been rendered contravened the requirements of the Fourteenth Amendment in [illegible] various respects hereinabove more fully indicated, viz.: First—as requiring of appellant, as the condition of the privilege of doing business in Minnesota, the surrender of a right afforded by the Federal Constitution; second—as a denial of due process of law; third—as a denial of the equal protection of the law; and fourth—the denial of the ordinary right of contract.

That as far as the assumed exercise of the power of [illegible] is concerned, no principle sustains any such assumption of that power; that no real objective [illegible] lation to that power, can be assigned to the law. [illegible]

nothing more than a futile gesture on the part of the legislature and a lame attempt to deny in certain classes of cases, and as to certain corporations, the ordinary right of recourse to the courts.

The judgment should accordingly be reversed.

Respectfully submitted,

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